(3)

Supreme Court, U.S.
FILED
MAY 9 - 2005
OFFICE OF THE CLERK

No. 04-969

In the Supreme Court of the United States

BILLIE J. SAUNDERS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE TO THE ESTATE OF JAMES E. SAUNDERS, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

ROBERT S. GREENSPAN
MARK W. PENNAK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly applied state law in holding that the United States could not be held liable under the Federal Torts Claims Act, 28 U.S.C. 2674, 1346(b), for the alleged failure of the United States Border Patrol to place a mandatory "hold" on an illegal immigrant in state custody so as to bar the release of that immigrant who thereafter murdered plaintiff's decedent.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 4
Conclusion 7

TABLE OF AUTHORITIES

Cases:

Bailey v. *Town of Forks*, 737 P.2d 1257 (Wash. 1987), amended, 753 P.2d 523 (Wash. 1988) 4
Donaldson v. *City of Seattle*, 831 P.2d 1098 (Wash. Ct. App. 1992) 5
Glidden Co. v. *Dzanak*, 370 U.S. 530 (1962) 5
McCarthy v. *United States*, 394 U.S. 459 (1969) 5
McMillian v. *Monroe County*, 520 U.S. 781 (1997) 4
Nguyen v. *United States*, 539 U.S. 69 (2003) 5
United States v. *Olson*, cert. granted, No. 04-759 (Mar. 7, 2005) 6
Yonker v. *State Dep't of Social & Health Serv.*, 930 P.2d 958 (Wash. Ct. App. 1997) 5, 6

Statutes and rule:

Federal Torts Claims Act:
28 U.S.C. 1346(b)(1) 2
28 U.S.C. 2674 2

Statutes and rule—Continued: Page

28 U.S.C. 2680(a)-(n) 2
8 U.S.C. 1226 3
8 U.S.C. 1226(c) 2, 3, 5, 6
Sup. Ct. R. 10(a) 5

In the Supreme Court of the United States

No. 04-969

BILLIE J. SAUNDERS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE TO THE ESTATE OF JAMES E. SAUNDERS, DECEASED, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.) is not published in the Federal Reporter, but is reprinted in 99 Fed. Appx. 814. The opinion and order of the district court (Supp. Pet. App.) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2004. A petition for rehearing was denied on July 20, 2004 (Pet. App. (Order)). The petition for a writ of certiorari was filed October 18, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States for torts of federal employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Congress vested the federal district courts with exclusive jurisdiction to hear those tort claims, *ibid.*, and provided that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. The FTCA contains several exceptions to this limited waiver of sovereign immunity. See 28 U.S.C. 2680(a)-(n); 28 U.S.C. 1346(b)(1).

b. Under 8 U.S.C. 1226(c), the "Attorney General shall take into custody" any alien who is removable from this country because he has been convicted of one of a specified set of crimes, once that alien is released from prison.

2. On October 7, 1999, James Saunders was murdered by Nicolas Vasquez, an alien who had recently been released from county jail in Washington State. At the time of his release, Vasquez was subject to detention under 8 U.S.C. 1226(c). Before Vazquez was released from Washington state custody, the Immigration and Naturalization Service (INS) was advised that Vasquez was in state custody. The INS did not take Vasquez into custody upon his release from state custody or place a hold on Vasquez's release so that he could be transferred to INS custody. Supp. Pet. App. 2-3.

3. Petitioner filed an FTCA action in the District Court for the Eastern District of Washington, alleging that Sec-

tion 1226(c) imposed a mandatory duty on the United States to take Vasquez into INS custody upon his release from state custody and that the breach of that duty led to Saunders' death. Supp. Pet. App. 6-7.

The district court granted the government's motion for summary judgment. The court held that the United States did not owe an enforceable duty to Saunders under Washington State's "public duty doctrine." Supp. Pet. App. 11. Under that doctrine, the court explained, no liability may be imposed for a public official's negligent conduct unless it is shown that the duty breached was owed specifically to the injured person and not merely "to the public in general." *Ibid.* Determining that 8 U.S.C. 1226(c) is intended to protect "society as a whole" and not a particular class of individuals, the district court concluded that the United States could not be held liable for failing to enforce that law. Supp. Pet. App. 18.

The district court further concluded that, even if Section 1226 does impose an actionable duty against the government, any breach of that duty was not the proximate cause of Saunder's death, because Vasquez's murder of Saunders was entirely unforeseeable. Supp. Pet. App. 25.

4. The court of appeals affirmed. (Pet. App. (Memorandum)). Assuming without deciding that 8 U.S.C. 1226(c) imposes a mandatory duty on the INS to place an immigration hold on an illegal alien in state custody, the court held that petitioner's claim nevertheless failed under the state-law public duty doctrine. Pet. App. (Memorandum) 3. The court explained that Section 1226(c) was intended not to protect a particular class of individuals, but rather to protect all potential victims of crime—that is, the public at large. *Id.* at 4. Having concluded that INS had not breached an actionable duty, the court of appeals found it

unnecessary to address the district court's holding that petitioner had failed to show proximate causation. *Id.* at 5.

ARGUMENT

1. a. Petitioner contends that this Court should grant certiorari "because the Ninth Circuit's interpretation of the Washington state public duty doctrine directly and irreconcilably conflicts with the decisions of the Washington Courts." Pet. 13. That state law question about the scope of the public duty doctrine, however, does not warrant this Court's review. Cf. *McMillian* v. *Monroe County*, 520 U.S. 781, 786 (1997) (stating that this Court "defers considerably" to court of appeals' "expertise" in interpreting the law of a State within its jurisdiction). Petitioner has pointed to no issue of federal law upon which the lower courts are divided.

In any event, the Ninth Circuit's decision is based on a correct reading of Washington law and does not conflict with the state court decisions on which petitioner relies. The Ninth Circuit correctly held that the exceptions to the public duty doctrine under Washington law apply only if, *inter alia*, the statute creating the duty is intended to "protect a particular and circumscribed class of persons," *Bailey* v. *Town of Forks*, 737 P.2d 1257, 1260 (Wash. 1987), amended, 753 P.2d 523 (Wash. 1988), or government agents knowingly fail to enforce a statute imposing a duty on them to act and the plaintiff falls "within the class the statute [is] intended to protect," *ibid.* Under both exceptions, as the Ninth Circuit explained, the plaintiff must identify a protected class "that is narrower than the public at large." Pet. App. (Memorandum) 4. If it were otherwise, the exceptions to the public duty doctrine would completely swallow the rule, for even duties of public employees that are owed only to the public at large would be actionable. In this

case, the Ninth Circuit found no evidence that the federal statute on which petitioner relies for the asserted duty of INS officials, 8 U.S.C. 1226(c), "was intended to protect anything other than the public at large," Pet. App. (Memorandum) 4. Because the Ninth Circuit followed the Washington Supreme Court's decision in *Bailey*, petitioner's claim of a conflict with that decision (see Pet. 15-18) is without merit. Neither of the other Washington decisions on which petitioner relies was a decision of the highest court of that State, and each involved a potential class of family members who were victims of domestic violence—a class far smaller than the public at large. See *Yonker* v. *State Dep't of Soc. & Health Serv.*, 930 P.2d 958 (Wash. Ct. App. 1997); *Donaldson* v. *City of Seattle*, 831 P.2d 1098 (Wash. Ct. App. 1992); see also Pet. App. (Memorandum) 5 n.2. Further review of the court of appeals' application of state law therefore is not warranted.

b. Petitioner submits that this Court should nevertheless grant review because, by assertedly misapplying Washington law, the Ninth Circuit "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power." Pet. 13 (quoting Sup. Ct. Rule 10(a)). This case, however, is not appropriate for review under this Court's supervisory power. This Court has traditionally exercised its supervisory power to correct errors involving "the proper administration of judicial business." *Nguyen* v. *United States*, 539 U.S. 69, 81 (2003) (quoting *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion)); see *McCarthy* v. *United States*, 394 U.S. 459, 463-464 (1969) (exercising supervisory power to set aside guilty plea, where district court failed to address defendant personally to determine if he understood the nature of the charge). Petitioners claims are not of that sort. Petitioner has not pointed to a defect in the proce-

dures employed by the court of appeals in considering her case; she has alleged simply that the court of appeals erred in a routine application of principles of Washington state law to the particular facts of this case.

2. There is a more fundamental reason why petitioner is not entitled to relief for the United States' alleged negligence in failing to place a hold on Vasquez or to take him into custody under 8 U.S.C. 1226(c). In *United States* v. *Olson*, No. 04-759 (Mar. 7, 2005), this Court granted certiorari to consider whether the liability of the United States under the FTCA is the same as that of a private individual under like circumstances, or the same as that of state and municipal entities under like circumstances. In this case, the court of appeals, in considering whether the United States could be held liable under the public duty doctrine, appears to have looked only to the principles applicable to municipalities and states and not to have considered the potential liability of a private individual under like circumstances. See *Yonker*, 930 P.2d at 961 (describing the public duty doctrine as applicable only to governmental agencies).

If this Court holds in *Olson* that the FTCA liability of the United States is determined solely by looking to the liability of a private person in like circumstances, then the underlying premise of petitioner's submission—that the liability of the United States should be determined by reference to the state-law public duty doctrine that is applicable to state and municipal officers—is itself fundamentally flawed, without regard to whether the court of appeals properly discerned state law on that issue. Because petitioner raises only questions of state law and proceeds on the premise that the state-law public duty doctrine to government actors does apply, there is no reason for the Court to hold the case pending its decision in *Olson*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

ROBERT S. GREENSPAN
MARK W. PENNAK
Attorneys

MAY 2005